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No. 87-228

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALUMINA PARTNERS OF JAMAICA,
Petitioner,

v.

CABLE BELT CONVEYORS, INC.,

and

PAUL N. HOWARD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Federal Arbitration Act, courts may order parties to arbitrate in a consolidated proceeding in the absence of language in the underlying arbitration agreements expressly calling for consolidation.

PARTIES TO THE PROCEEDING

Petitioner is Alumina Partners of Jamaica, a Delaware partnership consisting of Kaiser Jamaica Corporation, Reynolds Metals Company, and Alpart Jamaica, Inc. (formerly known as Anaconda Jamaica, Inc.).

Respondents are Cable Belt Conveyors, Inc., a Delaware corporation, and Paul N. Howard Company, a North Carolina corporation. In accordance with Rule 28.1, the Respondents' related companies are listed in Appendix A hereto.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves claims in arbitration arising out of two contracts providing for the construction of a conveyor system in Jamaica, West Indies. The first is a contract between the owner of the project, Alumina Partners of Jamaica ("Alumina") and the prime contractor, Cable Belt Conveyors, Inc. ("Cable Belt"); the second is a subcontract between Cable Belt and the subcontractor, Paul N. Howard Company ("Howard").

In the arbitration, Howard seeks to recover costs from Cable Belt that it allegedly incurred due to changes to the work. Cable Belt claims against Alumina, *inter alia*, that insofar as it might be liable to Howard for changes that Alumina ordered, Alumina is liable to Cable Belt.

Both the prime contract and the subcontract contained this identical arbitration language:

> *Any and all* questions, disputes or controversies *arising out of or in connection with* the [Contract] [Subcontract], its interpretation, application, performance, non-performance or breach, or any instruments executed and delivered hereunder shall, at the demand of either party hereto, be determined by arbitration in the City of New York, New York [before the American Arbitration Association] . . . .

Joint Appendix filed with the Court of Appeals (hereinafter "J.A.") at 520-21, 532 (emphasis added). Both arbitration clauses further stated: "The parties hereto consent to the jurisdiction of the Courts of the State of New York or the Federal Courts sitting in New York, as appropriate, for all purposes relating to the aforesaid arbitration . . . ." *Id.*

The District Court below ordered consolidation of the arbitrations. The Court of Appeals below affirmed without opinion and unanimously denied Alumina's petition for rehearing and rehearing *en banc*.

REASONS FOR DENYING THE WRIT

Alumina claims principally that the Second Circuit's decisions in this case and in *Compania Española de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), conflict with the Ninth Circuit's decision in *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and the Fifth Circuit's decision in *Del E. Webb Construction v. Richardson Hospital Authority*, No. 86-1570 (5th Cir. Aug. 3, 1987). This case does not, however, present an appro-

priate vehicle for resolving any intercircuit conflict, to the extent that one exists.

There is no circuit conflict where parties have agreed to consolidated arbitrations; in those cases, courts have uniformly ordered that their arbitrations be consolidated. Nor is there any circuit conflict where parties have agreed that their arbitrations should not be consolidated; in those cases, courts have uniformly refused to order consolidation. A circuit conflict can arise only in a case where the parties' intent on the question of consolidation cannot be discerned. In this case, however, and in each of the allegedly conflicting cases, the parties' intent regarding consolidation can be discerned.

In this case, Alumina agreed to arbitrate "[a]ny and all questions, disputes or controversies arising out of or in connection with the Contract . . . ." (J.A. 520.) Alumina also required in the contract that the subcontract between Cable Belt and Howard contain the same terms and conditions as the contract, so far as they were applicable. (J.A. 357.) Moreover, Alumina agreed in the contract to pay Cable Belt for costs incurred by Howard as well as Cable Belt due to changed and additional work.[1] Given similar facts, the Third and Fourth Circuits have both found that the parties implicitly agreed to consolidated arbitrations.[2]

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[1] Contract Exhibit L provides that Alumina shall be liable for costs incurred for changed or additional work, specifically including "Subcontractor's [Howard's] direct cost." (J.A. 317-18). Such costs for changed or additional work comprise the bulk of the claims Cable Belt and Howard assert in the consolidated arbitration.

[2] At page 4 of its petition, Alumina wrongly states that in seeking consolidation, Cable Belt and Howard "were not purporting to enforce any contract terms." Cable Belt and Howard's joint petition to consolidate specifically alleged: "Alumina agreed to consolidation when it entered the Contract, and particularly when it agreed to the Contract's arbitration clause." (J.A. 9-10.) And there is no doubt that the implicit agreement to consolidate is

In *Gavlik Construction Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975), the parties each agreed to arbitrate "all disputes arising out of, or relating to," their agreements; the prime contract established the requirements for the subcontractor's performance; and the owner agreed to reimburse the contractor for its subcontractor's costs. 526 F.2d at 788. The Third Circuit concluded, as a matter of simple contract interpretation, that the parties had agreed to a consolidated arbitration. *Id.* at 789.

Similarly, the Fourth Circuit recently ordered consolidation of an owner-contractor-subcontractor dispute like this one based solely on the parties' contracts. In *Maxum Foundations, Inc. v. Salus Corp.*, No. 86-3056, slip op. (4th Cir. March 4, 1987), the court found that the contracts before it were "strikingly similar" to those in *Gavlik*, and thus concluded that the parties had implicitly agreed to consolidate. Slip op. at 3.

By contrast, in *Weyerhaeuser*, while the Ninth Circuit held that a district court could not compel a vessel owner to participate with its charterer and a subcharterer in a consolidated arbitration without its consent, disagreeing with one prong of the Second Circuit's decision in *Nereus*, the Ninth Circuit stated that on the issue of consent, different facts were before the Second Circuit. The Ninth Circuit emphasized that the arbitration agreement in the case before it applied only to disputes between the owner and the charterer, and that the charterer had agreed that any subcharter into which it might enter would have no effect on the owner's obligations. 743 F.2d at 636-37. The court concluded: "It is clear

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enforceable. *See Perry v. Thomas*, —— U.S. ——, 107 S. Ct. 2520, 2527 n.9 (1987) (under the Federal Arbitration Act, courts must construe arbitration agreements in the same manner as they construe nonarbitration agreements under state law); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.13 (1976) (courts may enforce the implicit agreements of the parties).

that the parties here did not consent to joint arbitration." *Id.* at 637.

Similarly, in *Del E. Webb*, the Fifth Circuit held that consolidation was not available in a case between a building owner, contractor and architect because, as the court put it, their agreement "explicitly exclude[d] the architect from consolidated arbitration." Slip op. at 7. Indeed it did. The parties' agreement stated:

> No arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder, or in any other manner, the Architect, his employees or consultants except by written consent containing a specific reference to the Owner-Contractor Agreement and signed by the Architect, the Owner, the Contractor and any other persons sought to be joined.

Id.

Given the parties' implicit agreement to consolidate in this case, there is no need for this Court to resolve any disagreement between circuits on a broad question of a court's power *vel non* to order consolidation absent agreement among the parties. The question of consolidation in this case can be resolved as a routine matter of contract construction, which does not merit this Court's attention. As the Fourth Circuit stated in *Maxum Foundations*, where the parties have implicitly agreed to consolidation, "there is no need to test the limits of the Court's equity power to order consolidation to promote efficiency and prevent inconsistent arbitrations." Slip op at 4.[3]

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[3] In *Maxum Foundations*, the Fourth Circuit declined to have its opinion reported apparently because, according to that court's standards, the case did not involve a "legal issue of continuing public interest." See Statement of Internal Operating Procedures, United States Court of Appeals for the Fourth Circuit 36.3. The Fourth Circuit was right. The Federal Arbitration Act was enacted in 1925. Act Feb. 12, 1925, c. 213, 43 Stat. 883. In the 62

Even if the Second Circuit's decision in this case could not be harmonized with the decisions of other circuits, the conflict would not warrant resolution by this Court. Contracting parties can readily resolve questions of consolidation, like those concerning notice, the selection of arbitrators and other procedural issues relating to arbitration, merely by including an express provision therefor in their contract's arbitration clause. For example, the American Institute of Architects now inserts a reference to consolidation in its standard form contract for the construction industry, the area in which, as Alumina notes, consolidation issues arise most frequently. AIA Document A201, "General Conditions of the Contract for Construction," 1987 Edition, reprinted in part in Appendix B hereto. If such contracts explicitly exclude consolidation, the courts will respect those agreements, as the Fifth Circuit did in *Del E. Webb*. Contracting parties therefore do not need a decision from this Court in order to plan their course of conduct.

Petitioner also overlooks the fact that arbitration clauses almost invariably specify the locale of the arbitration. Thus there is no danger of "forum shopping" to warrant this Court's intervention. The parties select the forum before disputes arise. The decisions of the various circuits are binding only in those circuits, and by naming a city or venue in the agreement, the parties know exactly what court decisions can be applied to their subsequent arbitration. *See generally* Wallace, *The Nature and Extent of Intercircuit Conflicts*, 71 Cal. L. Rev. 913, 929-30 (1983).

Indeed, in its contract, Alumina expressly "consent[ed] to the jurisdiction of the Courts of the State of New York or the Federal Courts sitting in New York, as

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years since, the question of consolidation under the Act has generated only three published decisions by federal courts of appeals: *Nereus*, *Weyerhaeuser*, and *Del E. Webb*. In this case, the Second Circuit did not find it necessary to write an opinion.

appropriate, for all purposes relating to the aforesaid arbitration . . . ." (J.A. 521.) Alumina knew that the courts in New York, both state and federal, could consolidate the arbitrations. The state courts of New York have been consolidating arbitrations at least since 1970, *see In Re Vigo Steamship*, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970), and the federal courts in New York have been doing so at least since 1974 when *Nereus* was decided. In fact, in 1977 the New York State Court of Appeals put parties on notice that "parties signing an agreement to arbitrate must be held to do so in contemplation of the announced authority of the courts in proper cases to direct consolidation." *County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 128, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977). Alumina should not be heard to complain now that the "consolidation order directly contravened Alumina's agreement to arbitrate . . . ." Petition for a Writ of Certiorari at 10. It did not. When Alumina executed its contract dated 1981, it selected a forum and consented to the jurisdiction of courts where consolidation is routine.

Alumina's subsidiary argument, that the Second Circuit departed from this Court's teachings in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), is off the mark. Those cases do not address consolidation. They concern only the obligation of courts to require arbitration where the parties have agreed to arbitrate. In any event, Alumina's argument depends entirely on its incorrect assertion that consolidation "contravenes" or "alters" Alumina's arbitration agreement. As already noted, consolidation in this case does not contravene the parties' agreements; it is supported by the agreements.

CONCLUSION

This case does not present an important conflict worthy of the Court's attention. The decisions below are

consistent with other cases on consolidation, and factual distinctions could account for different results in the different cases. Moreover, the issue of consolidation is a simple procedural one that parties can decide themselves by including appropriate express provisions in their contracts. It is not a significant issue of substantive law. Accordingly, the issue does not merit review in this Court.

For all the foregoing reasons, the Court should deny the petition for writ of certiorari.

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APPENDICES

APPENDIX A

RESPONDENTS' RULE 28.1 STATEMENTS

Cable Belt Conveyors, Inc.

Parent corporation: Laird, Inc.

Paul N. Howard Company

Parent corporation: ITT Corporation

Subsidiary corporations with minority shares outstanding:

Wilton, Sutter and Co.
Steamboat Village Real Estate Corp.
Four Thirty Seven Land Company Inc.
HVA Government Securities Fund, Inc.
Twin City Fire Insurance Company
Gray Harbor Paper Co.
Redshaw, Inc.
Heritage Square Ltd.
Washington Sheraton Corporation
Abbey Life Insurance Company of Canada
The Great Eastern Insurance Company
London-Canada Insurance Company
Southwest Producing Company of Canada Limited
Excess Underwriting Management Singapore (PTE) Ltd.
ITT World Directories Inc.
Promedia SA
ITT World Directories (U.K.) Ltd.
Qume (U.K.) Limited
FLYGT France SA
ISOSTAT S.A. (France)
ITT Composants Et Instruments
Koni France Sarl
Sheraton Hotels France SA
Societe Civile Immobilierer Le Loubet
Societe Civile Immobilierer Principaute Villeneuve
Alfred Teves Metallwarenfabrik GMBH & Co. OHG

Alfred Teves GMBH & Co.
Dittha Deutsche ITT Handelsgellschaft MBH & Co.
Elkose GMBH Elektronik Vertrieb
Hans Werner Liebrich GMBH
ITT Regelungstechnik GMBH & Co. OHG
ITT Regelungstechnik Verwaltungs GMBH
Kolb GMH & Co., OHG
Loewe Pumpenfabrik GMBH
Muenchen Sheraton Hotel GMBH & Co.
Muller & Weigert GMBH
Otto Ramstetter Fabrik Elektrotechnischer
Apparate GMBH
Telcon Versicherung AG
Transatlantische Rueckversicherungs-AG
Transatlantische Sachversicherungs-AG
Golden Pages Ltd.
Cannon Electric Italiana Spa
Isitalia S.P.A.
ITT Grinnell Valves Europe, B.V.
Metalicht, B.V.
Publimedia, B.V.
Zwolsche Algemeene Beleggingen B.V.
Hotels Sheraton De Portugal Sarl
Sociedad Industrial De Electromagnetismo Sarl
SWF Autoelectric SA
Sheraton Hellas E.P.E.
Maister Directories Pty. Ltd.
Sheraton Tunisia Management Corporation
Teleradio Brasileira Ltd.
ITT Communicaciones Mundiales SA (Chile)
Sociedad Immobiliara San Cristobal SA
Cuban American Telephone and Telegraph Company
P.E.A. Industrial S.A. De C.V.
Sistemas De Bombeo SA de CV
Press Wireless Uruguaya Ltda
Cannon/Jae Ltd.
ITT Niles Co. Inc.
Daewoo-ITT Engineered Products Ltd.

APPENDIX B

THE AMERICAN INSTITUTE OF ARCHITECTS

AIA DOCUMENT A201

GENERAL CONDITIONS OF THE CONTRACT
FOR CONSTRUCTION

* * *

1987 EDITION

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This document has been approved and endorsed by the Associated General Contractors of America.

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* * *

ARTICLE 4

ADMINISTRATION OF THE CONTRACT

* * *

4.5 ARBITRATION

* * *

4.5.5 LIMITATION ON CONSOLIDATION OR JOINDER. No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.